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IN THE

Supreme Court of the United States

October Term, 1952.

No. 299.

ARTHUR P. JACOBY,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF NEW YORK.

Petition for Writ of Certiorari to the Court of Appeals of the State of New York.

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THE REPORTER COMPANY, INC., Walton, N. Y.—1952

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ARTHUR P. JACOBY,
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THE PEOPLE OF THE STATE OF NEW YORK.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK.

Petitioner, ARTHUR P. JACOBY, prays that a Writ of Certiorari issue to review the Judgment of the Court of Appeals of the State of New York made and handed down on the 17th day of April, 1952, in a case between the above parties entitled "The People of the State of New York, Respondent, vs. Arthur P. Jacoby, Defendant-Appellant."

Opinions Below.

The opinion of the County Court of the County of Steuben, State of New York (R. 15), is, so far as petitioner is aware, unreported. The several opinions in the New York Court of Appeals (R. 24, 30, 33) are reported in 304 N. Y. 33, No. 682 Official Ed. Law Reports (N. Y. May 24, 1952).

Statement.

Defendant is a youth of 19 years bearing a most excellent reputation in the community and never previously in any trouble of any sort (R. 12, f. 18). He appeared voluntarily in the City Court of the City of Corning, N. Y. (R. 7, f. 10). His conviction was on a plea of guilty. No formal trial was had nor evidence presented. He was not represented by legal counsel (R. 6, f. 9, R. 7-8, ff. 10-11).

The record of conviction (R. 6, f. 9) states that defendant was "on complaint of Off. H. Cole charge with the offense of Disorderly Conduct Sect. 43 of the Penal Law *committed* in the City of Corning, N. Y. *on the 9 day of July, 1950* * * *." (Italics supplied.)[1] The return, however, is devoid of any "complaint of Off. H. Cole" or of any other person. No claim was made that Officer Cole was present at the time the alleged crime was committed or had any personal knowledge of the facts. The affidavit of City Judge Charles H. Githler concedes that "no information was filed * * *" (R. 7, f. 10). He did, however, attach a sworn statement of the defendant[2] (R. 8-9). The record of conviction is simply what its name implies, a record made up after the event and signed by the Judge. It is in effect the minutes of the proceedings had and taken. Thus there was here no information or complaint in writing or of record. Defendant was sentenced

1. The italic repetition of part of this phrase in the Record is a typographical error.

2. This statement described dissimilar, unconnected events occurring June 28 and July 9, 1950. The material portion of this affidavit as to events of July 9, 1950 reads (R. 9, f. 13): "At about 11:25 P. M. on July 9, 1950, I was again driving around in my car when I saw two girls on Dodge Avenue and I, for the purpose of having a little excitement, nothing else, decided to scare them. I approached them, pretending that it was a hold-up but they ran away. I then left.

"I can never remember having done anything such as this before. I think it was caused more by a desire for excitement or urge to see if I could get away with something I had never done before than anything else."

to imprisonment in Steuben County jail for 6 months, with a fine of $250 or imprisonment for 250 days, 2 years probation and execution of jail sentence suspended during probation (R. 6-7).

On appeal to Steuben County Court, the conviction was affirmed by order of Acting County Judge E. C. Barkman, dated August 31, 1951 (R. 14), but the sentence was modified to 3 months jail and $50 fine, with suspension of jail sentence (R. 15). The County Judge did not treat defendant's affidavit as the essential information, but placed his decision on the ground that lack of an information was not jurisdictional and that by his plea of guilty defendant waived this as a mere irregularity[3] (R. 15-18). Defendant then appealed to the New York Court of Appeals by virtue of leave and on a certificate of reasonable doubt described in the jurisdictional statement herein. That Court on April 17, 1952, handed down its four to three decision affirming the judgments below (R. 24-42).

Three of the judges[4] favoring affirmance of defendant's conviction ruled that defendant's affidavit would be treated as the essential information[4] (R. 30) though no authority was cited for this novel and remarkable pronouncement. One judge[5] concurred on the theory that the necessity for such an information was waived by defendant's act of pleading guilty, there being, he said, no constitutional or statutory bar to or public policy in derogation of, such

3. E. C. Barkman, J.: "A plea of 'guilty' waives any defect not jurisditional" (R. 17, last par.).
"* * * this defendant having appeared voluntarily * * * and * * * pled guilty * * * thereby waived the filing of an information * * *" (R. 18, 4th par.).

4. Judge Conway, writing Opinion, concurred in by Loughran and Dye, JJ.: "So here we treat the defendant's affidavit as the information on this unusual record" (R. 30).

5. Judge Desmond: "The only question here is as to whether this defendant could, and did, waive the filing of a written information. I think he could, and did" (R. 32). And see *infra*, n. 13, 3rd par.

waiver (R. 32). The three judges[6] favoring reversal of the judgment and dismissal of the charges felt that the filing of a formal written information setting forth the charge against the defendant and the acts substantiating such charge was so fundamental to the requirements of due process of law[7] that it was a necessary jurisdictional element which could not be waived by the defendant and without which the Court could not proceed to judgment,[8] and that the defendant's own statement could not constitutionally be treated as the essential information.[9]

Jurisdiction. Time extended by Jackson

The Judgment of the New York Court of Appeals sought to be reviewed herein was made and handed down April 17, 1952. The jurisdiction of this Court is invoked under 28 U. S. C. §1257, subd. 3 (June 25, 1948, c. 646, §1, 62 Stat. 929), the final judgment having been rendered

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6. Judge Fuld, writing dissent, concurred in by Lewis and Froessel, JJ.

7. "'Real notice of the true nature of the charge' against the defendant in a criminal case has been described as 'the first and most universally recognized requirement of due process' (*Smith v. O'Grady*, 312 U. S. 329, 334). In that regard, the courts have scrupulously insisted that 'a person may not be punished for a crime without a formal and sufficient accusation even if he voluntarily submits to the jurisdiction of the court' (*Albrecht v. United States*, 273 U. S. 1, 8; see also *Weeks v. United States*, 216 F. 292, 293 (C. A. 2d) cert. den. 235 U. S. 697; *Clark, Handbook of Criminal Procedure* (1895), p. 104" (from dissent of Fuld, J. [R. 34]).

8. See dissent of Fuld, J., as quoted *infra*, n. 13, 4th par.

9. "* * * I am unable to understand how a self-accusation can in any event constitute a 'charge' in the legal sense, or, for that matter, in any other sense,[1] for it is of the very essence of such charge that someone other than the accused—either a public officer or a private complainant—shall present the accusation to which the defendant must answer. It would be an anomaly in our 'accusatorial' system of criminal law enforcement (see *Watts v. State of Indiana*, 338 U. S. 49, 54), to sanction prosecution on the basis of a self-accusatory statement by the defendant rather than a formal accusation proffered on behalf of the People. Any such extraordinary method of procedure could easily be productive of great abuse, with consequences prejudicial to the People as well as to an accused."

"(1) The word 'charge' is defined in Webster's New International Dictionary (2d ed. 1948, p. 452), as 'an accusation of a wrong or offense; allegation'" (from dissent of Fuld, J. [R. 36-37]).

by the highest court of the State of New York in which a decision could be had in a case where the "right, privilege or immunity is specially set up or claimed under the Constitution * * * of * * * the United States," to wit, that portion of section one of the Fourteenth Amendment to the United States Constitution which reads: "nor shall any State deprive any person of life, liberty, or property without due process of law."

The federal question sought to be reviewed—lack of procedural due process of law contrary to the Fourteenth Amendment of the United States Constitution—was raised in the New York Court of Appeals in and by a Certificate of Reasonable Doubt (R. 4), granted October 5, 1951, by Justice John C. Wheeler of the New York Appellate Division of the Supreme Court, Fourth Department. Such certificate was granted on motion for leave to appeal, opposed by Steuben County District Attorney[10] (R. 19-20, 3, 4). The certificate, following a recital of the proceedings below,[11] certified the questions of law which should be reviewed by the Court of Appeals as (R. 5, 6):

10. The grounds for this application were specified by defendant's attorney as follows (R. 22, *f.* 33):

"1. The conviction is illegal as it is not based upon any filed Information as required by law.

"2. The filing of an Information for the crime for which defendant was convicted, to wit: violation of Section 43 of the Penal Law, is mandatory and is the basis of the Court's jurisdiction to hear the charge and to impose sentence and the failure of the Court to require the filing of a sworn Information is a jurisdictional defect which was not waived by defendant's plea of guilty.

"3. That the defendant has been convicted without due process of law in violation of the Fourteenth Amendment to the Federal Constitution and Section 6 of Article I of the New York State Constitution."

11. These included a finding (R. 5) "That no Information was filed either as the basis for a Warrant of Arrest or for the purpose of informing the defendant of the particular charge against him and of the acts claimed to have been committed by him substantiating or tending to substantiate such charge."

"(1) whether or not the conviction of and subsequent sentence imposed on defendant by Corning City Court were erroneous, illegal and void due to the absence of any information setting forth the particular charge against the defendant and the acts claimed to have been committed by him substantiating or tending to substantiate such charge.

"(2) whether or not the filing of an information charging defendant with violation of Section 43 of the Penal Law was mandatory under the statutes and practice so that absence of such Information left the Court without jurisdiction to hear the charge and impose sentence, or whether such failure was only an irregularity; and if the latter,

"(3) whether or not such defect could be and was waived by the guilty plea of this defendant, a minor aged 19 years; and

"(4) whether defendant has been deprived of his rights without due process of law in violation of the Fourteenth Amendment of the United States Constitution and Section 6 of Article One of the Constitution of the State of New York."

The question of jurisdiction and due process thus raised was argued in the brief and orally[12] and was passed on by the New York Court of Appeals in the following manner: The judgment of conviction below was affirmed (R. 41-42, f. 52). The entire Court of seven judges seemed in agreement on two propositions: first, that the basic question involved was whether or not the Court had jurisdiction of the subject matter, i. e., jurisdiction to proceed with the prosecution, the defendant having conferred jurisdiction of his person by voluntary ap-

12. As the whole argument in the Court of Appeals involved the contention that lack of an information was jurisdictional, that the necessity for having an information was fundamental and a prerequisite to the proceedings and validity of the judgment of conviction, defendant, perforce, attempted to eliminate from the questions on appeal the latter portion of specification (2) of the certificate and thereby also specification (3). In other words, his position was that the information being jurisdictional and fundamental to a valid judgment no questions of waiver (by plea of guilty) was involved.

pearance;[13] and second, "that prosecution for misdemeanor can proceed only upon a written information designating the offense charged and setting out the acts allegedly committed by the defendant constituting that offense" (R. 33, ¶3, dissent of Fuld, J.; and R. 28, 31).

Defendant's affidavit was not in the City Court treated as the essential information (R. 6, 7); nor was it so treated by the Steuben County Court (R. 15-19); nor was it regarded as such by four of the seven judges in the Court of Appeals,[14] though three of these four, through

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13. "It is now urged upon us that the City Court of Corning had no jurisdiction of the subject matter because no proper information had been filed and that is the sole question—of jurisdiction—which is presented to us." (From opinion of Conway, J., concurred in by Loughran, and Dye, JJ., R. 27, 3d par.).

"No appeal lies from a criminal judgment entered on a plea of guilty unless the sentencing court lacked jurisdiction either of the subject matter of the crime adjudged, or of the person of the defendant * * *"

"* * * It is traditional New York law that a defendant may waive anything except the Court's jurisdiction over the subject matter of the crime, unless such a waiver is prohibited by the Constitution, or by a statute or by a strong public policy * * * There is, of course, no such constitutional or statutory bar [as the requirement of indictment for felony charges] to the waiver of an information * * *" (from concurring opinion of Desmond, J., R. 31-32).

"Some confusion has crept into the cases through the failure to distinguish between the matter of securing jurisdiction over the person of the defendant and the matter of proceeding with the prosecution after the defendant has been brought before court * * * The fact that the court has properly secured jurisdiction of the person of the defendant cannot, however, eliminate the requirement that 'a formal and sufficient accusation' be lodged against him as the basis for proceeding with the prosecution (see *Albrecht v. United States, supra*, 273 U. S. 1, 8). As has been pointed out in the leading case of *Weeks v. United States* (*supra*, 216 F. 292, 293, cert. den. 235 U. S. 697), 'A court can acquire no jurisdiction to try a person for a criminal offense unless he has been charged with the commission of the particular offense and charged in the particular form and mode required by law. If that is wanting, his trial and conviction is a nullity, for no person can be deprived of either life, liberty, or property without due process of law.'" (From dissent of Fuld, J., concurred in by Lewis and Froessel, JJ., R. 36.)

14. Desmond, J., concurring for affirmance stated (R. 32): "I omit, also, as unnecessary, any consideration of whether defendant's written confession could be treated as the information here (it was not, apparently, so treated in the City Court)."

Fuld, J., in dissent, concurred in by Lewis and Froessel, JJ., said (R. 33) that the city judge's return "establishes not only that the statement was not treated as an information, but that it was following its submission and after discussion before the court that defendant was charged orally with a

the dissent of Fuld, J., argued the insufficiency of the affidavit even if it were treated as an information[15] (R. 37-39).

Thus the case involves at heart a question of procedural due process as tested by common law tradition. It is of little import that the majority discussion below makes no particular reference to the issue as a constitutional one and makes no specific reference to the 14th Amendment. The effect of the decision denies the right of an accused to a fundamental element of so-called "procedural regularity": "real notice of the true nature of the charge." Such notice was termed by this Court, through Mr. Justice Black, "the first and most universally recognized requirement of due process" in *Smith v. O'Grady*, 312 U. S. 329, 334, 61 S. Ct. 572, 574 (1941). This is not merely a question of state law, of what the highest state court may term permissible, for the Fourteenth Amendment has placed restrictions "upon the manner in which the States may enforce their Penal Code."[16] Thereby this Court is given the responsibility of "sub-

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violation of section 43. It was at that point that 'the arrest was formally made and entered upon the Police and Court records.' There is no showing in the return, however, that the oral charge was supplemented by an information or complaint in writing, or by any specification whatever—oral or in writing—of the acts charged against defendant."

15. On this see *infra*, point 3-E.

16. Nor does the fact that petitioner challenged the conviction under the State Constitution as well as Federal relegate the case to one of state law. In *Smith v. O'Grady*, 312 U. S. 329, 61 S. Ct. 572, Mr. Justice Black stated: "The judgment of Nebraska Supreme Court is a final and authoritative answer to petitioner's contention that his imprisonment was illegal under the State's Constitution and laws. But petitioner also contended that his imprisonment was illegal under the Federal Constitution. And in denying the writ the Nebraska Court necessarily held that petitioner's allegations—even if proven in their entirety—would not entitle him to habeas corpus, even if the petitioner showed a deprivation of federally protected rights."

jecting state criminal procedures to constitutional judgment."[17] Other elements of the jurisdictional problem appear in the argument, *infra*.

Questions Presented.

Whether a State Court conviction by plea of guilty for a crime (misdemeanor), subject under the State Law to prosecution by information, is in violation of the Due Process Clause of the Fourteenth Amendment to the United States Constitution, where no information was filed charging any offense or the acts constituting the alleged offense.

Whether such due process was violated by treating an affidavit of defendant as the essential information.

Statutes Involved.

There is no express statutory or constitutional provision of New York requiring the filing of a written or sworn information in the prosecution of cases such as this in counties such as Steuben, i. e., outside the City of New York.

Section 43 of the New York Penal Law, under which defendant was convicted, reads:

> "Sec. 43. Penalty for acts for which no punishment is expressly prescribed. A person who wil-

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17. Frankfurter, J. in *Rochin v. People of California*, U. S. , , 72 S. Ct. 205, 207, 208 (No. 83, Jan. 2, 1952).
This Court's *per curiam* in *Mooney v. Holohan*, 294 U. S. 103, 112-113, 55 S. Ct. 340, 342, stated: "And the action of prosecuting officers on behalf of the state, like that of administrative officers in the execution of its laws, may constitute state action within the purview of the Fourteenth Amendment. That amendment governs any action of a state, 'whether through its legislature, through its courts, or through its executive or administrative officers' (citing cases).
"* * * Upon the state courts, equally with the courts of the union, rests the obligation to guard and enforce every right secured by that Constitution. *Robb v. Connolly*, 111 U. S. 624, 637."

> fully and wrongfully commits any act which seriously injures the person or property of another, or which seriously disturbs or endangers the public peace or health, or which openly outrages public decency, for which no other punishment is expressly prescribed by this chapter, is guilty of a misdemeanor; * * *" (McKinney's Consol. Laws of New York, Book 39, Part 1, p. 43).

Other statutory provisions which may bear on the matter are set forth in Appendix, *infra*.

Reason for Granting the Writ—Argument.

1. The decision of the New York Court of Appeals conflicts in principle with pronouncements of this Court in analogous situations of procedural due process. The case of *Albrecht v. United States*, 273 U. S. 1, 47 S. Ct. 250 (1927), involved federal procedure in a prosecution on an information filed by a United States Attorney under his official oath of office, not sworn to as required of a private person. The defect in the procedure by which defendant was brought into court had been cured when the second motion to quash was made. The Court, through Mr. Justice Brandeis, stated (p. 8; 252-253):

> "The invalidity of the warrant is not comparable to the invalidity of an indictment. A person may not be punished for a crime without a formal and sufficient accusation even if he voluntarily submits to the jurisdiction of the Court. * * * Where there was an appropriate accusation either by indictment or information, a court may acquire jurisdiction over the person of defendant by his voluntary appearance."

There seems a pretty clear implication here that where there is no appropriate accusation voluntary appearance confers nothing, especially as he refers in a footnote to

Weeks v. United States, 216 F. 292 (C. A. 2d),[18] cert. den. 235 U. S. 697.

Further cases on this point are referred to or discussed, *infra*, particularly under Point 3-B.

2. The question presented would seem of considerable importance in the administration by the States of their criminal laws and penal codes for the following reasons:

A. It does not appear to have been expressly decided by this Court.

B. Nor does this Court appear to have decided the minimal requirements placed on the States by the Fourteenth Amendment with respect to the notice to which a defendant is entitled when prosecuted by way of information rather than by indictment. This method of prosecution has had tremendous impetus and growth in recent years both in the state and federal courts. Whether or not it is through a statutory scheme or through common law processes would seem immaterial in so far as the minimal requirements are concerned. It thus presents a question "affecting both private and public rights and interests of great magnitude,"[19] and involves a consideration of what restrictions have been im-

18. In the *Weeks* case, defendant appeared generally and demurred to the information of the United States Attorney as not supported by verification or oath showing personal knowledge or probable cause. This was overruled and defendant was tried and found guilty. The Circuit Court of Appeals thru Rogers, J., stated (p. 293):

> "There can be no conviction or punishment for a crime without a formal and sufficient accusation. A court can acquire no jurisdiction to try a person for a criminal offense unless he has been charged with the commission of the particular offense and charged in the particular form and mode required by law. If that is wanting, his trial and conviction is a nullity, for no person can be deprived of either life, liberty, or property without due process of law. The forms or modes of accusation which the law recognizes are: "Indictment or presentment by a grand jury; and information by the public prosecutor."

19. Mathews, J. in *Hurtado v. People of the State of California*, 110 U. S. 516, , 4 S. Ct. 11, 113 (1884).

posed upon the states by the Fourteenth Amendment in this important field.[20]

Its importance is also shown by the fact that although New York adopted a short-form indictment in 1929,[21] within ten years the New York County District Attorney's Office deemed it advisable and through the work of Stanley H. Fuld,[22] Chief of the Indictment Bureau did make a revision and simplification of its indictment forms to supplant the standard long forms generally used; and that other states have short-form indictment statutes.[23]

C. This Court is the only forum where it can be determined conclusively whether the procedures resulting in the conviction of this defendant, hence any defendant in any State of the Union similarly situated, "offend those canons of decency and fairness which express the notions of justice of English-speaking peoples even toward those charged with the most heinous offenses" (Frankfurter, J., in *Malinski v. Peo. of the State of New York*, 324 U. S. 401, 417, 65 S. Ct. 781, 789 [1945]).

D. It involves a matter not merely of form but of fundamental process in the acquisition of criminal jurisdiction as to which there must be uniform minimal require-

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20. *Id.*, wherein this Court decided that the due process clause of the Fourteenth Amendment did not in felonies prevent the substitution for a presentment or indictment by grand jury or a proceeding by information accompanied by the procedures deemed necessary to guard the substantial interests of the accused.

These same considerations are applied by this Court today in granting certiorari. *Rochin v. People of the State of California*, *supra*, n. 17 (physical extortion of criminal evidence).

21. N. Y. Code Crim. Proc. c. III-A, L. 1929, c. 176, held constitutional in *People v. Bogdanoff*, 254 N. Y. 16 (1930) by a 4-3 decision.

22. The same person, who as Court of Appeals Judge wrote the dissent in the case at bar. Due to his work in this field, he is eminently qualified to appreciate the factors and considerations involved and the minimal procedural requirements required and necessary in the proper protection of both the individual and the State.

23. See Notes and Legis., Streamlining the Indictment, 53 Harv. L. Rev. 122 (1939); Comments, 35 Mich. L. Rev. 456 (1937).

ments for all states no matter how varied or different the procedural devices employed. For whether the Court's jurisdiction is invoked by indictment, presentment, information, complaint or whatnot there must be a minimum as to what will be deemed "real notice of the true nature of the charge" beyond which no court, federal or state, may proceed with impunity.[24] By all standards this can be no less than will fairly apprize an accused of what wrong it is claimed he has done.[25]

3. The decision of the New York Court of Appeals is believed to be erroneous upon the following considerations:

A. It runs counter to principles enunciated by this Court in other cases, as set forth in Point I, *supra*, and in B hereunder.

B. It fails to accord the accused a personal immunity which is "so rooted in the traditions and conscience of our people as to be ranked as fundamental"[26] or is "implicit in the concept of ordered liberty."[26] Seventy-five years ago Chief Justice Waite succinctly stated the requirements and purposes of the charge, in that case a

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24. In *Herbert v. State of Louisana*, 272 U. S. 312, 316-317, 47 S. Ct. 103, 104 (1926), Mr. Justice Van Devanter said that what the fourteenth Amendment requires "is that state action, whether through one agency or another, shall be consistent with the fundamental principles of liberty and justice which lie at the base of all our civil and political institutions and not infrequently are designated as 'law of the land.' Those principles are applicable alike in all the states and do not depend upon or vary with local legislation" (citing cases).

Compare minimum standards apparently urged in Michigan Law Review Comment with Harvard Law Review Notes and Legis., *supra* n. 22; see also A. L. I. Code Crm. Proc. (1930) §§152, 154, 155.

25. See also cases under 3-B herein.

26. Mr. Justice Cardozo, speaking for the Court in *Snyder v. Commonwealth of Massachusetts*, 291 U. S. 97, 105, 54 S. Ct. 330, 332 (1934); and *Palko v. State of Connecticut*, 302 U. S. 319, 325, 58 S. Ct. 149, 152 (1937); quoted with approval by Frankfurter, J. in *Rochin v. People of California*, *supra*. n. 17.

federal indictment, in *United States v. Cruikshank*, 92 U. S. 542, 558-559, 92 S. Ct. 588, 593-594 (1876).[27]

Surely an accused is at least entitled to enough by way of a charge, no matter what its form may be, in a state court as well as a federal court, so that he may make an intelligent decision as to his own course of action and not be subject to subsequent prosecution for the same cause. He was hardly given that in the case at bar. And without such a minimum of protection how can it be said he was accorded that "fundamental fairness" essential under our Constitution?

Counsel is not unaware of the fact that this Court has upheld the power of states to employ short-form or simplified indictment. But it is believed that in such cases the statutory scheme employs adequate safeguards as to the fundamental requirement of real notice of the charge, or by giving the accused the right to a bill of particulars. While such latter practice is provided for in New York as to short-form indictments,[28] there is not provision for bills of particulars in prosecutions

27. "The object of the indictment is, first, to furnish the accused with such a description of the charge against him as will enable him to make his defense, and avail himself of his conviction or acquittal for protection against a further prosecution for the same cause; and, second, to inform the court of the facts alleged, so that it may decide whether they are sufficient in law to support a conviction, if one should be had. For this, facts are to be stated, not conclusions of law alone. A crime is made up of acts and intent; and these must be set forth in the indictment with reasonable particularity of time, place and circumstances.

"* * * The accused must be advised of the essential particulars of the charge against him, * * * The accused has, therefore, the right to have a specification of the charge against him [where the general allegation includes things pertinent and things not pertinent in law to constitute a crime] in this respect, *in order that he may decide whether he should present his defense by motion to quash, demurrer or plea;* and the court, that it may determine whether the facts will sustain the indictment." (italics supplied)

See Comments, 35 Mich. L. Rev. 456 (1937), at 460 and n. 13 indicating that this case has been cited, approved and followed many times by this Court.

28. It was apparently this feature which led to sustaining the short-form indictment as not violative of due process of law in the *Bogdanoff* case, *supra*, n. 21.

for misdemeanors, by information in courts of special sessions in Steuben County.

Mr. Justice Cardozo, after adverting to certain state court procedures not in conflict with due process under the Fourteenth Amendment, stated in *Snyder v. Commonwealth of Massachusetts*, 291 U. S. 97, 105, 54 S. Ct. 330, 332 (1934): "What may not be taken away is notice of the charge and an adequate opportunity to be heard in defense of it."

"A charge fairly made" was called a fundamental procedural safeguard by Mr. Justice Black in *Chambers v. State of Florida*. 309 U. S. 227, 236, 60 S. Ct. 472, 477 (1940). His even more forceful statement in *Smith v. O'Grady* has already been noted in the jurisdictional statement.

Yet these were clearly taken away by the State in the instant case where there was no information or complaint charging defendant with wrongful acts and intent and some specified crime.

C. The possible sanction given by the decision to an oral charge of crime—even though the Judges stated that a written information was necessary to jurisdiction—runs counter to every tradition of the common law and the penal codifications arising therefrom.[29]

That a criminal prosecution must be preceded by a written charge is one of those things which have come to us from time immemorial and is so generally assumed and understood that there is a dearth of discussion of it in the cases. Where the occasion has led to historical

29. It should perhaps be noted that a distinction is well established in New York, with the validity of which we are not here concerned, between crimes of the class designated as misdemeanors and those minor offenses, below the grade of misdemeanors and constituting a class by themselves, which may be dealt with summarily by justices of the peace or magistrates, such as disorderly conduct and the like. *People v. Grogan*, 260 N. Y. 138, 141. This distinction is remarked by Fuld, J. (R. 35, last par.).

research, however, the Courts seem to have found agreement among the commentators from Lord Coke through Blackstone to the present that a charge in writing is essential.[30] This requirement has by long and universal acceptance by all Courts of our land acquired a status which may well be termed basic to jurisdiction in a criminal case. It is elementary that without jurisdiction no valid judgment, civil or criminal, may be granted. And this Court has firmly and uniformly held any such judgment invalid and a nullity under the Due Process Clause.[31]

D. The device of employing the accused's own statement as the essential information is not only novel and without precedent in New York, or the other states, or the federal courts, so far as we have been able to determine, but likewise runs counter to the common law. We can do no better here than refer to the remarks of Fuld, J., dissenting, on this phase of the case (R. 36-37): "Any such extraordinary method of procedure could easily be productive of great abuse, with consequences prejudicial to the People as well as to an accused" (R. 37).

From the constitutional aspect the emphatic remarks of Mr. Justice Frankfurter in a case involving extorted confessions and holding that it violates the underlying principle in our enforcement of the criminal law, *Watts v. State of Indiana*, 338 U. S. 49, 54, 69 S. Ct. 1347, 1350 (1949), seems appropos:

> "Ours is the accusatorial as opposed to the inquisitorial system. Such has been the characteristic of Anglo-American criminal justice since it freed itself from practices borrowed by the Star Cham-

30. *Weeks v. United States*, 216 F. 292; *Hurtado v. State of California*, 110 U. S. 516, 4 S. Ct. 111. And see dissent of Fuld, J. herein (R. 35, last par.).

31. *Scott v. McNeal*, 154 U. S. 34, 14 S. Ct. 1108 (1894); *Pennoyer v. Neff*, 95. U. S. 714, (1878). Such decisions, of course, point up the fact that state court judgments procured without jurisdiction are reviewable in this Court. See 54 Harv. L. Rev. 1066 (1941).

> ber from the Continent whereby an accused was interrogated in secret for hours on end. See Ploscowe, The Development of Present-Day Criminal Procedure in Europe and America, 48 Harv. L. Rev. 433, 457-58, 467-473 (1935). Under our system society carries the burden of proving its charge against the accused not out of his own mouth. It must establish its case, not by interrogation of the accused even under judicial safeguards, but by evidence independently secured through skillful investigation. 'The law will not suffer a prisoner to be made the deluded instrument of his own conviction.' 2 Hawkins, Pleas of the Crown, c. 46, §34 (8th ed., 1824). The requirement of specific charges, their proof beyond a reasonable doubt, the protection of the accused from confessions extorted through whatever form of police pressures, the right to a prompt hearing before a magistrate, the right to assistance of counsel, to be supplied by government when circumstances make it necessary, the duty to advise an accused of his constitutional rights—these are all characteristics of the accusatorial system and manifestations of its demands."[32]

E. Though it would not seem necessary at this time, and perhaps not appropriate to argue the insufficiency of the defendant's affidavit, even though treated as the essential information, brief comment will be made. The dissent below appears to be on much sounder ground than the prevailing opinion on this point. Just how Judge Conway pieced out of this affidavit, except by surmise as suggested by Judge Fuld, violation on July 9, 1950, of that portion of Section 43 of the Penal Law which refers to an act "which openly outrages public decency," is dif-

32. His conclusion: "In holding that the Due Process Clause bars police procedure which violates the basic notions of our accusatorial mode of prosecuting crime and vitiates a conviction based on the fruits of such procedure, we apply the Due Process Clause to its historic function of assuring appropriate procedure before liberty is curtailed or life is taken," would appear equally valid were the word "any" substituted for the word "police," and as thus phrased aptly applies to the case at bar.

ficult to comprehend. These are hardly "words of art," having such a fixed or universal meaning that he who runs may read and understand. Contrawise, they would mean many different things to as many different people. The defendant's affidavit expressly negatived any criminal intent. He referred to no acts on July 9, 1950, which even remotely outrage public decency.

The section (see Statutes, *supra*) actually comprehends at least seven types or classes of acts. Its heading is significant. The police refer to it as "the elephant's foot"—for obvious reasons—and use it as such. Which one of these types or classes of acts was he charged with? No one could know from the proceedings taken in Corning City Court. Such a catch-all statute may not be left at large by the state court which applies it.[33] "Conviction upon a charge not made would be sheer denial of due process."[34] That seems to fit the case at bar.

And in any event, the treating of the affidavit as the essential information and then saying it is sufficient as such so inextricably weaves the substantive common law questions into the federal question of deprivation of "fundamental guarantees" that it should be reversed by this Court under the Due Process Clause.[35]

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33. *Thornhill v. Alabama*, 310 U. S. 88, 60 S. Ct. 736 (1940); *Cantwell v. Connecticut*, 310 U. S. 296, 60 S. Ct. 900 (1940).

34. In *Thornhill* case, *supra*, the late Mr. Justice Murphy quotes from *DeJonge v. Oregon*, 299 U. S. 353, 262, 57 S. Ct. 255, 259 (1937).

35. See, Recent Cases, 54 Harv. L. Rev. 1066 (1941).

CONCLUSION.

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Dated: August 22, 1952.

Respectfully submitted,

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and
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